

§ 2570.85

(b) At any time prior to the expiration of the payment period for the assessed penalty, any person who has committed, or knowingly participated in, a breach or violation, or has been alleged by the Secretary to have so committed or participated, may submit a written request for a conference with the Secretary to discuss the calculation of the assessed penalty. A person will be entitled under this section to one such conference per assessment. If such written request is submitted during the 60 day payment period described in subparagraph (a), such a request will not toll the running of that payment period.

(c) The notice of assessment will become a final order (within the meaning of 5 U.S.C. 704) on the first day following the 60 day payment period, subject to any tolling caused by a petition to waive or reduce described in § 2570.85.

§ 2570.85 Waiver or reduction of civil penalty.

(a) At any time prior to the expiration of the payment period for the assessed penalty, any person who has committed, or knowingly participated in, a breach or violation, or has been alleged by the Secretary to have so committed or participated, may petition the Secretary to waive or reduce the penalty under this section on the basis that:

(1) The person acted reasonably and in good faith in engaging in the breach or violation; or

(2) The person will not be able to restore all losses to the plan or participant or beneficiary of such plan without severe financial hardship unless such waiver or reduction is granted.

(b) All petitions for waiver or reduction shall be in writing and contain the following information:

(1) The name of the petitioner(s);

(2) A detailed description of the breach or violation which is the subject of the penalty;

(3) A detailed recitation of the facts which support one, or both, of the bases for waiver or reduction described in § 2570.85(a) of this part, accompanied by underlying documentation supporting such factual allegations;

(4) A declaration, signed and dated by the petitioner(s), in the following form:

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Under penalty of perjury, I declare that, to the best of my knowledge and belief, the representations made in this petition are true and correct.

(c) If a petition for waiver or reduction is submitted during the 60 day payment period described in § 2570.84(a) of this part, the payment period for the penalty in question will be tolled pending Departmental consideration of the petition. During such consideration, the applicant is entitled to one conference with the Secretary, but the Secretary, in his or her sole discretion, may schedule or hold additional conferences with the petitioner concerning the factual allegations contained in the petition.

(d) Based solely on his or her discretion, the Secretary will determine whether to grant such a waiver or reduction. Pursuant to the procedure described in § 2570.83(b), the petitioner will be served with a written determination informing him or her of the Secretary's decision. Such written determination shall briefly state the grounds for the Secretary's decision, and shall be final and non-reviewable. In the case of a determination not to waive, the payment period for the penalty in question, if previously initiated, will resume as of the date of service of the Secretary's written determination.

§ 2570.86 Reduction of penalty by other penalty assessments.

The penalty assessed on a person pursuant to this section with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such person with respect to such transaction under ERISA section 502(i) and section 4975 of the Code. Prior to a reduction of penalty under this paragraph, the person being assessed must provide proof to the Department of the payment of the penalty or tax and the amount of that payment. Submissions of proof of other penalty or tax assessments will not toll the 60 day payment period, if previously initiated.

§ 2570.87 Revision of assessment.

If, based on the procedures described in § 2570.84, 2570.85, or 2570.86, the assessed penalty amount is revised, the

person being assessed will receive a revised notice of assessment and will be obligated to pay the revised assessed penalty within the relevant 60 day payment period (as determined by the applicable procedure in § 2570.84, 2570.85, or 2570.86), and, if necessary, any excess penalty payment will be refunded as soon as administratively feasible. The revised notice of assessment will revoke any previously issued notice of assessment with regard to the transaction in question and will become a final order (within the meaning of 5 U.S.C. 704) the later of the first day following the 60 day payment period or the date of its service on the person being assessed, pursuant to the service procedures described in § 2570.83(b).

§ 2570.88 Effective date.

This section is effective June 20, 1990, and shall apply to assessments under section 502(l) made by the Secretary after June 20, 1990, based on any breach or violation occurring on or after December 19, 1989.

Subpart E—Procedures for the Assessment of Civil Penalties Under ERISA Section 502(c)(5)

SOURCE: 68 FR 17508, Apr. 9, 2003, unless otherwise noted.

§ 2570.90 Scope of rules.

The rules of practice set forth in this subpart are applicable to “502(c)(5) civil penalty proceedings” (as defined in 2570.91(n)) under section 502(c)(5) of the Employee Retirement Income Security Act of 1974. The rules of procedure for administrative hearings published by the Department’s Office of Administrative Law Judges in subpart A of 29 CFR part 18 will apply to matters arising under ERISA section 502(c)(5) except as described by this section. These proceedings shall be conducted as expeditiously as possible, and the parties shall make every effort to avoid delay at each stage of the proceedings.

§ 2570.91 Definitions.

For 502(c)(5) civil penalty proceedings, this section shall apply in

lieu of the definitions in § 18.2 of this title.

(a) *Adjudicatory proceeding* means a judicial-type proceeding before an administrative law judge leading to the formulation of a final order;

(b) *Administrative law judge* means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105;

(c) *Answer* means a written statement that is supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to 29 CFR 2560.502c-5(g);

(d) *Commencement of proceeding* is the filing of an answer by the respondent;

(e) *Consent agreement* means any written document containing a specified proposed remedy or other relief acceptable to the Department and consenting parties;

(f) *ERISA* means the Employee Retirement Income Security Act of 1974, as amended;

(g) *Final order* means the final decision or action of the Department of Labor concerning the assessment of a civil penalty under ERISA section 502(c)(5) against a particular party. Such final order may result from a decision of an administrative law judge or the Secretary, the failure of a party to file a statement of reasonable cause described in 29 CFR 2560.502c-5(e) within the prescribed time limits, or the failure of a party to invoke the procedures for hearings or appeals under this title within the prescribed time limits. Such a final order shall constitute final agency action within the meaning of 5 U.S.C. 704;

(h) *Hearing* means that part of a proceeding which involves the submission of evidence, either by oral presentation or written submission, to the administrative law judge;

(i) *Order* means the whole or any part of a final procedural or substantive disposition of a matter under ERISA section 502(c)(5);

(j) *Party* includes a person or agency named or admitted as a party to a proceeding;

(k) *Person* includes an individual, partnership, corporation, employee benefit plan, association, exchange, or other entity or organization;